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IN THE

Supreme Court of the United States

October Term, 1964
No. 985

WALTER ELY and STUART L. KADISON,

Petitioners,

vs.

THE OFFICIAL CREDITORS' COMMITTEE OF FOX MARKETS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

No opinion was rendered by the District Court. The "findings" of the District Court (App. A. of Petition) were held by the Court of Appeals for the Ninth Circuit to be in essential respects "without support in the record" or merely "conclusions of law, ultimate findings, or mixed findings of fact and law" (App. B of Petition 24). The opinion of the Court of Appeals for the Ninth Circuit is reported at 337 F. 2d 461. Petitioners' petition for rehearing was denied without opinion.

Jurisdiction.

Jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1) and Section 24(c) of the Bankruptcy Act, 11 U.S.C.A. 47(c).

Question Presented.

The Court of Appeals concluded, upon a careful study of the voluminous record, that the fee allowance of $170,000.00 to petitioners by the District Court was grossly excessive and a manifest abuse of discretion. The Court of Appeals held that the award was unsupported in the record, was contrary to the history and purpose of the Bankruptcy Act and violative of the statutory standards of reasonableness and economy. The Court, therefore, modified the order of the District Court by providing a total compensation of $50,000.00 for petitioners, and as so modified, affirmed the order of the District Court.

The question presented is whether the unanimous decision of the Court of Appeals is plainly correct.

Statutes Involved.

The case involves Section 241 of the Bankruptcy Act, 11 U.S.C.A. 641 (Petition 4-5) providing for "reasonable compensation" for services rendered in corporate reorganization proceedings, and Section 250 of the Bankruptcy Act, 11 U.S.C.A. 650 (July 1, 1898, C. 541, section 250, as added June 22, 1938, c. 575, section 1, 52 Stat. 901) which reads as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allow-

ances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Statement.

This litigation involves fees awarded to petitioners for services rendered jointly by petitioners in certain limited matters as associate counsel to the attorneys for a trustee in a corporate reorganization proceeding.

The employment of these petitioners commenced on March 26, 1962 [C. T. 280-283]. More than a year before that time, Fox Markets, Inc., operator of a large chain of markets, had requested leave to file proceedings under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. 722 [C. T. 2-5, 93]. In these arrangement proceedings, Irving Sulmeyer was appointed Receiver, and a law firm, Buchalter, Nemer, Fields and Savitch, were his duly appointed attorneys.

The debtor's store properties were some 54 in number, all under lease [C. T. 94]. The lessors of two of these stores sought termination of their leases and reclamation of the premises [C. T. 96-129, 847]. The two lessors were successful in proceedings before a Referee in Bankruptcy, and the Receiver petitioned for review [C. T. 167-183, 847]. While the review proceedings were pending in the District Court, on March 7, 1962, the debtor filed a petition for reorganization under Chapter X of the Bankruptcy Act [C. T. 243-249]. The same Irving Sulmeyer was appointed Trustee in the reor-

ganization proceedings, and the same law firm Messrs. Buchalter, Nemer, Fields and Savitch, "fully familiar with the said presently pending matters" (App. B. of Petition 14-15) were employed, by leave of Court, as attorneys for the Trustee [C. T. 251-266].

Until then, neither of these petitioners was connected with nor involved in the aforesaid proceedings. [C. T. 243, 250]. On March 26, 1962, a little more than two weeks after the appointment of the aforesaid law firm as attorneys for the Trustee, the Trustee applied to the District Court to employ petitioners as associate counsel to the said law firm for the specific purpose of representing the Trustee in the review proceedings involving the two store properties [C. T. 273-275].

The avowed object of the retention of petitioners was to take "a completely new approach" to the two reclamation proceedings [C. T. 275]. In fact, all that occurred thereafter was that general counsel for the trustee and associate counsel, these petitioners, stipulated with counsel for the lessors that the prior petitions for reclamation in the Chapter XI proceedings be treated as petitions for reclamation in the Chapter X proceedings, and that the matters be heard on the record made before the Referee in the Chapter XI proceeding (in which petitioners were not involved). Following the stipulation, briefs were submitted and oral argument made thereon before the District Court [R. T. 266-267, 381; C. T. 387-396, 397-438].

The two memoranda submitted to the District Court [C. T. 352-364, 397-434], virtually the same in content, contained routine arguments on questions of law neither complex nor difficult, most of which arguments

had been previously advanced by general counsel for the Trustee prior to the retention of appellees [C. T. 174-175]. There were short oral arguments before the District Court on two different days [C. T. 453-454; R. T. 381-383, 388], and then the case was submitted on the briefs and all prior records in the Chapter XI proceedings [C. T. 453-454; R. T. 388]. The District Court held against the lessors [C. T. 452-465, 849]. Appeals by the lessors were dismissed on stipulation (App. B to Petition 16, n. 2).

The petitioners filed a joint application for compensation [C. T. 846-887]. Each of the petitioners requested an allowance in the sum of $100,000.00 [C. T. 860]. According to the time sheets annexed to the application, petitioner Ely expended 134.5 hours on behalf of the Trustee, thus valuing his services at the rate of $743.00 per hour. Petitioner Kadison claimed a total time expended of 537.2 hours, of which 200.8 hours was expended by a law assistant. Thus, petitioner Kadison valued his services at $186.00 per hour [C. T. 862-887]. Petitioner Ely did not testify at the District Court hearing on the application for fee allowances, nor did petitioner Kadison's law assistants. Petitioner Kadison testified that petitioner Ely did not keep time sheets, and so petitioner Kadison kept a record of petitioner Ely's time [R. T. 159].

The testimony of the Trustee at the hearing before the District Court on petitioner's application for fees undermined petitioner's claims. The petitioners had urged in their application for compensation that the retention of the two stores was indispensable to any reorganization plan, and that the entire proceedings

would have fallen into an adjudication in bankruptcy if the two stores had not been retained. The Trustee, petitioner's witness, denied that an adjudication would have followed if the two stores were not retained, nor would the Trustee agree that the saving of the two stores resulted in the reorganization [R. T. 74-75]. In fact, the reorganization plan submitted to the Court in the Chapter X proceeding *specifically excluded* the two stores [C. T. 758, 786, 792]. This testimony also found support in the testimony of the chairman of the negotiating committee on behalf of the creditors, who also made clear that the retention of the two stores was not an indispensable condition to the implementation of any reorganization plan, of which there were a number proposed, and that the plan finally presented excluded the two stores [R. T. 436-454].

The testimony of petitioner Kadison established without meaningful dispute that the legal issues with respect to the retention of the two stores were neither difficult nor complex. The nature and character of the services rendered and the time expended were routine and limited. There was considerable duplication in the services of petitioners. Petitioners' employment was not contingent nor did petitioners lose any clients by reason of the limited services rendered. The reason for retaining petitioners was not clear in the record, and their retention was to a large extent unnecessary [R. T. 111-116, 151, 416].

Upon the conclusion of the hearing on the fee allowances, the District Judge declined to hear argument [R. T. 531], immediately announcing it was making a total award of $170,000.00 to petitioners.

The unanimous opinion of the Court of Appeals reflects a meticulous analysis of the record and a thoughtful application of pertinent legal principles distilled from the authoritative decisions and statutory history governing the administration of estates under the Bankruptcy Act (App. B to Petition). The Court of Appeals held that Section 241 of the Bankruptcy Act "imposes a standard of reasonableness in fee allowances to trustees and their attorneys" (App. B to Petition 19). The Court states that the aforesaid test "reflects a Congressional policy, based upon an extensive history, opposed to the allowance of excessive or exorbitant compensation"; that the "Supreme Court and other Courts have time and again emphasized this Congressional policy, and all through the cases the guiding test is that of economy." (App. B to Petition 19).

Giving due consideration to the aforesaid history and purpose of the Bankruptcy Act, and after a careful study of the record and the pertinent cases, the Court of Appeals concluded that the fee allowance of $170,000.00 to petitioners was "clearly excessive" (App. B to Petition 13). The Court made a detailed examination of petitioner's application for fee allowances (App. B to Petition 17-19), and the "findings" of the District Judge patterned upon the said application (App. B to

Petition 24-25), and found both the application and the findings to be totally without support in the record in all essential respects (App. B to Petition 18-31). The Court of Appeals stated that it was "forced to the conclusion that the importance of their [petitioners'] service as well as the results obtained are greatly exaggerated" (App. B to Petition 22-23); that petitioners, along with the trial court, had fallaciously relegated the time element "to one of minor importance" as a factor in determining a reasonable allowance (App. B to Petition 20); that the "amount of the allowance on its face was violative of the statutory standard and was an abuse of the Court's discretion" (App. B to Petition 22).

Thus, the Court of Appeals concluded that there was "no substantial basis in the record for the fee allowance as made by the District Court"; and that the allowance was therefore "clearly excessive" (App. B to Petition 33). Thereupon, "taking all pertinent factors into consideration", the Court unanimously adjudged that a total award of $50,000.00 would be fair and reasonable (App. B to Petition 33). The order of the District Court was therefore modified by providing a total compensation of $50,000.00 to petitioners, to be apportioned as they saw fit, and as so modified, the order of the District Court was affirmed.

ARGUMENT.

I.

The Decision Below Is Clearly Correct. There Is No Conflict of Decision.

Although petitioners labor to create a "conflict" in the decisions, the effort appears fruitless in the light of their own arguments and cited cases (Petition 10-16). All of the decisions upon which petitioners rely uniformly emphasize the fundamental policy of the Bankruptcy Act, to wit, that the administration of the debtor's estate under the governing statute must be conducted with the strictest economy. This policy has, of course, been strongly emphasized in the decisions of this Court. *Callaghan v. Reconstruction Finance Corp.*, 297 U.S. 464, 468-469; *Realty Associates Securities Corp. v. O'Connor*, 295 U.S. 295, 299; *Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382, 388; *Brown v. Gerdes*, 321 U.S. 178, 181-182; *Wolf v. Weinstein*, 372 U.S. 633, 641.

All of the cases cited by petitioners uniformly stress the aforesaid factor of economy, and all are in agreement that the time expended in rendering services is a salient factor in deciding the amount of fee allowances in reorganization proceedings, albeit other factors such as the novelty of the questions involved or the results achieved may be considered, as the evidence in particular cases justifies such consideration.

The cases in this area are also in agreement, it should be noted, that claimants for fee allowances in reorgani-

zation proceedings may not expect to be compensated on the basis of standards obtained in private employment. *Realty Associates Securities Corp. v. O'Conner,* 295 U.S. 295; *In re McGrath Mfg. Co. of Omaha, Nebraska,* 95 F. Supp. 825, 829 (D.C. Neb. 1951). Moreover, duplicate and unnecessary services are ordinarily not entitled to compensation. *Coskery v. Roberts & Mander Corp.,* 200 F. 2d 150, 155 (3rd Cir. 1952); *In re Food Town, Inc.,* 208 F. Supp. 139, 146 (D.C. Md., 1962); *In re Moorhead Knitting Co.,* 58 F. Supp. 93, 98 (D.C. Pa. 1944); *In re Mt. Forest Fur Farms of America,* 62 F. Supp. 59, 68 (D.C. Mich. 1945) aff'd 157 F. 2d 640 (6th Cir. 1946).

The decision of the Court of Appeals below is plainly consistent with all the aforesaid. The Court acted upon the record made by the parties in the District Court. There was nothing in the record to sustain the position of petitioners that the questions of law involved were novel or difficult. Nor did the record support petitioners' theory in the trial court that retention of the two stores by the debtor, never indispensable to the reorganization plan, justified petitioners' "princely" claims. See, *Finn v. Childs Co.,* 181 F. 2d 431, 435 (2nd Cir. 1950). Essentially, aside from the question of time expended where petitioners to some degree attempted to be factual, the record before the Court of Appeals was barren of any evidence to support the grossly excessive award made by the District Court to these petitioners.

Indeed, petitioners appear to have abandoned many of the contentions made below in support of the award, and now assert that "the single most important criterion applied by the Circuit Courts in reviewing the size of attorney allowances is the ability of the reorganized cor-

poration to pay" (Petition 12-13). None of the cases cited by petitioners support this sweeping generalization. Indeed, most of the cases relied upon by petitioners in their petition are sharply opposed to petitioners' position. An examination of the facts in each of petitioners' cited cases only makes clear that the Court of Appeals was plainly correct in holding that the award of $170,000.00 in these proceedings was clearly unfair, excessive and unreasonable. Petitioners have been unable to produce even one case involving similar factors and similar circumstances where an award even approximating the award made in this case by the District Judge has ever been upheld.

It is submitted that the decision of the Court of Appeals modifying the award was plainly correct, and entirely consistent with the applicable decisions of this Court, its own prior decisions and the decisions of other Courts of Appeal.

II.

There Is No Confusion, Confict or Uncertainty in the Decisions.

Petitioners claim conflict between the decision of the Court below and "the decisions of almost every United States Circuit Court of Appeals" (Petition 17), and it is further claimed that "the decisions of the various Circuits are inconsistent and in conflict with one another" (Petition 17). It is asserted that there is "confusion, conflict and uncertainty" in the decisions (Petition 17), and that this Court should "establish the criteria" whereby the "standard of reason" imposed by the provisions of the Bankruptcy Act shall be justly applied.

There is no confusion or conflict in the decisions, it is submitted, and the standards and criteria for determining reasonable compensation under the Bankruptcy Act have been repeatedly stated by this Court (App. B to Petition 19-20). The "confusion" to which petitioners refer lies not in the provisions of the Bankruptcy Act, nor in the decisions of this Court and the lower courts; petitioners suffer only from their own obfuscation of the record and their misapprehension of the decided cases. The "conflict" of which petitioners complain exists not in the decisions, but in their own inability to square their extravagant claims for fee allowances in a corporate reorganization proceeding with the limited services rendered by petitioners in such proceedings.

The Court of Appeals, in modifying the award to peitioners, acted plainly within the decisions of this Court and the decisions of other Courts of Appeal. The standards and criteria applied by the Court below were those clearly and uniformly applied by this Court and the Courts of Appeal in all jurisdictions. Indeed, the modified award to petitioners by the Court of Appeals (App. B to Petition 33) was, in the light of the record, unmistakenly fair and reasonable.

III.

There Is No Question of Due Process of Law Involved.

The petitioners urge that it was a denial of due process of law for the Court below to modify and affirm the order of the District Court instead of remanding with instructions, or in failing to grant a hearing *en banc* as requested in petitioners' petition for rehearing

after decision by the Court of Appeals. Petitioners apparently do not claim that the denial of a hearing *en banc*, or the affirmance of an order after modification, without remand, are *per se* violative of due process. The power of the Court of Appeals to modify and affirm an award of fee allowances in a corporate reorganization proceeding is well established by statute and decision, See, *Silver v. Scullin Steel Co.*, 98 F. 2d 503, 506 (8th Cir. 1938); 11 U.S.C.A. 47(a); 11 U.S.C.A. 650.

The circumstances therefore upon which petitioners rely to support their due process argument is that the Court of Appeals "was unqualified to substitute its judgment for that of the highly qualified trial court" (Petition 20); that the knowledge possessed by the members of the Court of Appeals of the current economics of the private practice of law "is questionable" (Petition 18); that one member of the court below "has not engaged in the private practice of law for over half a century", and his two colleagues have not so practiced "for over a quarter of a century." (Petition 18).

The arguments made by petitioners on this score are unsound in law and offensive in fact. The petition deserves not only to be denied, but stricken as well from the files of the Court, it is respectfully submitted. See Rule 40(5). It is clearly unnecessary to delineate in a brief to this Court the long and distinguished services rendered by the eminent jurists who sat in the court below, and whose many opinions in every field of the law are available to those willing to look.

Aside from the lack of relevance and materiality in petitioners' arguments, it appears unusually reckless and

baseless to assert that members of the judiciary today do not know the "current economics of the private practice of law" merely because they have graced the bench for many years. A more assiduous reading of the decided cases, the reports of judicial conferences and other professional meetings discussed in law reviews and bar journals would, it is submitted, help petitioners to understand that the judiciary is not so insulated from life or the economics problems of the legal profession, in bankruptcy proceedings or elsewhere.

Petitioners assert that the knowledge of the economics of the practice of law in California could only have been derived from "the record in this case, which overwhelmingly supported the award" (Petition 18). But it was precisely on the record made in this case in California on uncontradicted evidence that the Court of Appeals was compelled to hold that the award to the petitioners was grossly excessive and a manifest abuse of discretion (App. B to Petition).

Nor is it appropriate for petitioners to suggest that "the economics of the practice of law" in California are so different from other geographical areas as to justify a claim for $743.00 per hour and $186.00 per hour in a corporate reorganization proceeding, where routine and limited services have been rendered by two officers of the court for a short period of time where the trustee was already adequately represented. No expertise is needed, it is respectfully submitted, to conclude that such claims, especially on the record here, were totally groundless and violative of basic precepts governing the administration of debtor estates under the Bankruptcy Act.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. KATZ,
Counsel for Respondent.

LOUIS C. HOYT,
Of Counsel.